No. 58

In the

Supreme Court of the United States

OCTOBER TERM, ~~1948~~ 1949

ROY CREEL, *et al.*,

Petitioners,

v.

LONE STAR DEFENSE CORPORATION,

Respondent.

RESPONDENT'S OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The adoption by petitioners of the facts related in the opinion of the United States Court of Appeals

> "except insofar as such facts conflict with the contention of coverage * * * and except insofar as such facts conflict with the allegations of petitioners for overtime as prayed for"

is incongruous and amounts to no statement at all, necessitating, therefore, the following full statement by respondent, and to the extent that petitioners' statement conflicts with the following, it is not accepted.

This is a suit by petitioners for overtime compensation, liquidated damages and attorneys' fees, under the Fair

Labor Standards Act.' After issue was joined on the pleadings, respondent filed motion for summary judgment, with supporting affidavits, and the motion was not controverted, hence the facts stated in the supporting affidavits are taken as true. The facts thus uncontroverted are:

Respondent was incorporated under the laws of Ohio in 1941 for the sole purpose of fulfilling and performing Contract W-ORD-516, DA-W-ORD-3, as amended, to avail the Government of the key personnel, industrial organization, mass production, "know-how", and industrial technique of The B. F. Goodrich Company, the services of which, along with other large manufacturing concerns, representatives of the United States Ordnance Department stated, in conference with Goodrich officials, were essential to the War Department's vast plans for national security. (Para. 1, Original Affidavit supporting Motion for Summary Judgment.)

The Lone Star Ordnance Plant was an ordnance facility owned by the United States Government. It was constructed during the war for the production of munitions, such as aerial bombs, cluster aerial bombs, 105 mm. shells, 50 mm. shells, detonators, fuses, etc., for use by the Government in the prosecution of the war. (Paragraphs 1-4, inclusive, Original Affidavit supporting Motion for Summary Judgment.)

The United States, by written contract (see Exhibit "A" attached to Original Affidavit) retained respondent to recruit labor and other personnel for, and to manage

[illegible] 52 Stat. 1060, 29 U. S. C. 201-219.

the operation of, the Ordnance Plant. Respondent was paid a fixed fee for this service, and all costs of operation, including the cost of labor and materials, which costs exceeded $10,000.00, were at the Government's expense. (Page 1, Exhibit "A" attached to Original Affidavit); (see also Paragraph 2, Original Affidavit and supporting Motion for Summary Judgment.) At all times involved, the premises upon which petitioners were employed, the tools and equipment furnished or supplied to them by respondent which they, and all others working on the premises were using in their employment, and the property and products with which they dealt in such employment, were all in their entirety the property of the United States. (Paragraphs 3 and 5, Original Affidavit supporting Motion for Summary Judgment.)

By the terms of the Contract, the title to all materials, tools, machinery, equipment, supplies, and all other property of, upon, located at, and used by the Plant, including all parts, components, explosives and materials from which the respondent assembled munitions under its Contract, was in the United States Government, and title to all items purchased by the respondent immediately vested in the Government at the point of shipment. (Paragraph 5, Original Affidavit supporting Motion for Summary Judgment.)

Under the Contract, the Government furnished, supplied, and caused to be shipped to the Plant, all parts, components, explosives and materials used in the assembling and loading of ammunition, except such small quantities of small metal

parts (inconsequential in amount) as the Contracting Officer from time to time directed respondent to furnish, and under said Contract, the title to such Plant purchased material immediately vested in the Government at the point of shipment. (Paragraph 26, Original Affidavit in support of Motion for Summary Judgment.)

Respondent did not ship finished ammunition from the Plant; all such shipments were made by the Ordnance Department, on Government bills of lading. (Paragraph 36, Original Affidavit supporting Motion for Summary Judgment.)

Respondent at no time had title to the finished products of the Plant, and at no time had title to any of the component parts of such products, or of the materials, supplies, machinery, equipment, or other property used in connection with the contract, title thereto and possession thereof being at all times in the United States and subject to its sole control. (Para. 1, Supplemental Affidavit Motion for Summary Judgment, R. 79-80.)

The Government did not purchase munitions from the respondent. (Paragraph 2, Supplemental Affidavit Motion for Summary Judgment, R. 80.)

The respondent did not sell munitions to the Government, or to any other party. (Paragraph 3, Supplemental Affidavit Motion for Summary Judgment, R. 80.)

No munitions or other products were manufactured or processed at the Ordnance Plant except from materials belonging to the Government, and all such munitions and

other products were by the Government used in the prosecution of the war. (Paragraph 4, Supplemental Affidavit Motion for Summary Judgment, R. 80.)

The United States furnished and shipped to the Ordnance Plant approximately 90-95 per cent of all materials, supplies, machinery, equipment, and other property used in connection with the Management Service Contract for the operation of such Plant. The remainder (approximately 5 per cent) of the materials, supplies, etc., were purchased by respondent. The bulk of all such purchases (approximately 95 per cent of the purchased material) was approved by the Government prior to the issuance of a purchase order by respondent. Title to such purchased materials vested in the United States at their points of origin, and such materials were shipped to the Ordnance Plant on Government bills of lading marked "Government property for Military Use." The remainder of the materials purchased by respondent, which were not shipped on Government bill of lading, consisted of less than car lot shipments and purchases in an amount less than $500.00; title to these purchases, however, also vested in the United States. (Para. 5, Supplemental Affidavit Motion for Summary Judgment, R. 80-81.)

A Governme.. Finance Officer in Washington, D. C., paid the freight on the Government bills of lading. (Para. 6, Supplemental Affidavit Motion for Summary Judgment, R. 81.)

The United States had title to and possession of all materials, supplies, machinery, equipment, and other prop-

erty used in connection with the Management Service Contract for operation of Lone Star Ordnance Plant at all times relevant hereto. (Para. 7, Supplemental Affidavit Motion for Summary Judgment, R. 81.) The United States maintained an Accountable Property Officer to be accountable for all property used in connection with the Contract between the Government and the respondent. (Para. 8, Supplemental Affidavit Motion for Summary Judgment, R. 81.)

Prior to the time the Plant actually began operations, the United States advanced to respondent a large sum of money to defray anticipated operating expenses. As money was withdrawn from this fund, it was replenished by the Government. Respondent was not required to use any of its own money in the operation of Lone Star Ordnance Plant. (Para. 9, Supplemental Affidavit Motion for Summary Judgment, R. 81-82.)

The Government contracted for electric power, gas, telephone, telegraph and teletype service at the Plant, and paid such bills directly. Respondent acted as an agent of the Government for the purpose of causing official business messages to be transmitted. (Para. 10, Supplemental Affidavit Motion for Summary Judgment, R. 82.)

In the operation of the Plant, the Ordnance Department specified the various items which it desired to have loaded and supplied production schedules which set forth the quantities of the various items that it desired loaded each month. The quantities specified in the production schedules were revised by the Ordnance Department from month to

month, and it was a frequent and common occurrence that the schedule would be increased or decreased in the month, due to the fluidity of the war and resulting demand for different ordnance items, or for larger or smaller quantities of particular items. During the operation of the Plant, the indicated quantities of the particular ammunition items were loaded in the Plant's various load lines. (Para. 29A, Affidavit in Support of Motion for Summary Judgment.)

The Plant was under the control and supervision of the Chief of Ordnance, United States Army. A Commanding Officer appointed by the Chief of Ordnance was on duty at Lone Star Ordnance Plant at all times relevant hereto, and had complete control over the property and the installations thereon. (Para. 11, Supplemental Affidavit Motion for Summary Judgment, R. 82.)

By deed, Honorable Coke Stevenson, as Governor of the State of Texas, ceded jurisdiction over the Lone Star reservation to United States Government for all purposes except the service of civil process upon respondent, and the United States Government had exclusive jurisdiction over the premises embracing the Lone Star Ordnance Plant. (Para. 12, Supplemental Affidavit Motion for Summary Judgment, R. 82.)

The Government retained the right to dismiss any employee at the Plant which the Contracting Officer should deem incompetent or whose retention was by him deemed not to be in the public interest. (Para. 13, Supplemental Affidavit Motion for Summary Judgment, R. 82-83.)

The Government approved all wage and salary rates. The Government also required that no key employees and their principal assistants be hired or assigned to service until there had been submitted and approved by the Contracting Officer a statement of the previous salary, proposed salary, qualifications and experience of the persons selected for such assignment. (Para. 14, Supplemental Affidavit Motion for Summary Judgment, R. 83.)

All munitions processed at the Plant were processed under the direct supervision and control of the Government (Para. 15, Supplemental Affidavit Motion for Summary Judgment, R. 83.)

The Government specified the loading processes to be used. It directed the type and quantity of munitions, the specifications thereof, and the rate of production. Inspections were made by the Government during the various steps of their processing. Detailed rules and regulations governing safety and methods of production were promulgated by the Government. Respondent was required to comply with such rules and regulations and to meet specifications, and Government officers and employees were present to report on compliance. (Para. 16, Supplemental Affidavit Motion for Summary Judgment, R. 83.) The Government, from time to time, sent to respondent production schedules directing respondent to produce munitions of certain designated specifications. Respondent was required to meet these schedules. It had no discretion as to the type of munitions to be made, the quantity thereof, or the method or process used in their manufacture, and respondent

produced no munitions except as required by Government directive. (Para. 17, Supplemental Affidavit Motion for Summary Judgment, R. 83-84.)

On occasions the Government transferred production schedules from other ordnance plants to the Lone Star Ordnance Plant for completion. In such cases, if the original plant had made any contracts for materials and supplies on account of such schedules, respondent was required to take over such supply contracts and to pay the vendors in accordance therewith from funds supplied to respondent by the Government. (Para. 18, Supplemental Affidavit Motion for Summary Judgment, R. 84.)

Respondent was not penalized if the materials processed at the Plant did not meet specifications and could not be used. Under the Contract between respondent and the Government, respondent was allowed all costs of reworking rejected munitions and all costs of material finally rejected. (Para. 19, Supplemental Affidavit Motion for Summary Judgment, R. 84.)

Of the direct materials used in the manufacture of munitions, the Government furnished materials of the approximate value of $503,393,000.00. Respondent purchased and paid for with Government money materials of the approximate value of $32,514,139.66. (Para. 20, Supplemental Affidavit Motion for Summary Judgment, R. 84.)

Government employees employed by the Ordnance Department audited the respondent's time cards and payrolls, and during a part of the time, witnessed the actual payments to respondent's employees, and during the re-

mainder of the time, witnessed actual payments to a sufficient number of the employees to satisfy the Government that their actual payments were being made, as indicated by respondent's payroll records. (Para. 21, Supplemental Affidavit Motion for Summary Judgment, R. 85.)

Respondent paid wages and salaries of employees by check against a bank account, the funds of which were furnished by the Government, and were subject to withdrawal by the Government. (Para. 22, Supplemental Affidavit, Motion for Summary Judgment, R. 85.)

No sales tax was paid by respondent on materials purchased for use at Lone Star Ordnance Plant, no ad valorem taxes on real or personal property at Lone Star Ordnance Plant was paid to the State or the County, and no license or registration fees were paid on motor vehicles used in connection with the operation of the Plant. (Para. 23, Supplemental Affidavit, Motion for Summary Judgment, R. 85.)

Under Article VII-B of the Management Service Contract under which respondent operated the Lone Star Ordnance Plant, provision was made for changes in it, the work to be performed, and the method for effecting such changes, following which was the following conclusion:

> "* * * but nothing provided in this Article shall excuse the Contractor from proceeding with the prosecution of the work so changed." (Page 31, Exhibit "A", Management Service Contract.)

Article VII-E(4) of such contract provided that the Government should prescribe procedures to be followed by

the Contractor in accounting, checking and auditing functions, and that "* * * if in the opinion of the Contracting Officer, the number of employees engaged in checking, auditing and accounting work is excessive, the Contractor shall make such reductions in force as the Contracting Officer deems necessary." (Page 33, Exhibit "A", Management Service Contract.)

Article VII-F (7) of such contract provides that the Contractor shall "At all times use its best efforts in all acts hereunder to protect and subserve the interest of the Government." (Page 34, Exhibit "A", Management Service Contract.)

By Change Order No. 4, dated July 9, 1943, Section 4, of Article V-A, of Title 5, was changed to give the Government the right to pay directly to the persons concerned all sums due from the Contractor for labor, material, or other charges, which was reaffirmed by and incorporated in Supplement 8 to the Contract. (See Page 7, Supplement 8.)

By Change Order No. 7, dated October 12, 1943, respondent was directed to perform, at the Navajo Ordnance Depot, Bellemont, Arizona, all work necessary or incident to the reworking and renovating of certain ammunition, and these provisions were reaffirmed by and incorporated in Supplement 8 to the Contract. (See page 4, Supplement 8.)

By Change Order No. 9, dated April 3, 1944, and Change Order No. 10, dated April 7, 1944, the terms of both of which were included in Supplement 11 dated June

30, 1944, it was provided that the Contractor "* * * shall, as directed, from time to time by the Contracting Officer, receive, inspect (including X-raying), assort, screen, segregate, load, renovate, recondition, rehabilitate, * * * any ammunition (including components and containers) even though it is not specifically mentioned in this Contract, *regardless of its origin*, in such quantities as may be directed by the Contracting Officer;" (Emphasis supplied.)

Sub-section 1, of Article VI-A, of Title 6, of the Management Service Contract, provides that "The Government may terminate this contract at any time by a notice in writing from the Contracting Officer to the Contractor. Such termination shall be effective in the manner and upon the date specified in said notice * * *. Upon receipt of such notice, the Contractor shall, unless the notice directs otherwise, immediately discontinue all work * * *."

Notice of termination of work under such Contract was given on behalf of the Government "for the convenience of the Government" by the Contracting Officer for the Chief of Ordnance on October 18, 1945, to be effective midnight October 6, 1945. (Notice of termination, part of Exhibit "A", Management Service Contract.)

The claims of all petitioners all originated during the time the Plant was under operation. The operation of the Plant is controlled by Title IV, of the Management Service Contract, and by such provisions of Titles V, VI and VII as may be applicable to the work under Title IV.

Article IV-D of Title 4 of the Management Service Contract (see pages 16 and 17 of Exhibit "A" attached to Affidavit supporting Motion for Summary Judgment) specifically provided that the provisions of the Walsh-Healey Act should apply *to the operation of the Plant* under Title IV of this contract.

The Fair Labor Standards Act is not mentioned in Title IV of the contract.

PREFACE TO ARGUMENT

This Court, in *Kennedy v. Silas-Mason Company*,[2] did not condemn Summary Judgment procedure; it only disapproved it in this case because of the fact deficiencies in the record. The United States Court of Appeals, in writing the opinion in the case at bar, had in mind this Court's opinion in the *Kennedy case*, as also the Court's decision in *Murphy v. Reed*,[3] and meticulously pointed out that the record in this case supplied the deficiencies, and concluded that such record met the requirements of the Summary Judgment Rule,[4] as interpreted by this Court.

SUMMARY OF ARGUMENT

I.

The Lone Star Ordnance Plant was operated by the Government through the "agency" of respondent, under a Management Service Contract entered into pursuant to the

[2] *334 U. S. 249.*

[3] *335 U. S. 865.*

[4] *Rules 56(b), (c), (d) and (e), Federal Rules of Civil Procedure.*

Act of July 2, 1940 (c. 508, 54 Stat. 712) amended under First War Powers Act of December 18, 1941 (50 App. U. S. C. A. 611) and Executive Order 9001 of December 17, 1941 (6 F. R. 6787), hence respondent was not an independent contractor, and petitioners were employees of the Government, and excluded under Section 3(d) of the Fair Labor Standards Act.

II.

The Management Service Contract under which respondent operated the Plant was entered into by the War Department with respondent for "the manufacture of supplies, articles and equipment (munitions of war) in an amount exceeding $10,000:00." The Walsh-Healey Public Contracts Act (49 Stat. 2036, 41 U. S. C. A. Secs. 35-45) rather than, and to the exclusion of the Fair Labor Standards Act, fixed and determined the labor standards, hours of work and overtime compensation of petitioners, even if respondent were considered an independent contractor.

III.

The application of the Fair Labor Standards Act was excluded and superseded by the Act of June 28, 1940 (54 Stat. 676, c. 440, 50 U. S. C. A. App., Sec. 1151, et seq.), pertaining to the Naval and Coast Guard Services, and the Act of July 2, 1940, relating to the War Department. Said Acts provided for a new system for the production of munitions, military equipment and supplies, which innovation was neither private enterprise nor Government operation, but an amalgamation of the two. The First War

Powers Act, and Executive Order 9001 promulgated pursuant thereto authorized the Secretary of War, regardless of any previous law, to make contracts for the operation of munitions plants, preserving, however, in their proper fields, the application of the Walsh-Healey Act, the Bacon-Davis Act, the Copeland Act, and the Eight Hour Law, pursuant to which the labor standards of the Walsh-Healey Act were applied to such operations, to the exclusion of all other Federal laws regulating wage payments.

IV.

Neither petitioners nor respondent was engaged in interstate commerce, nor in the production of goods for commerce, within the meaning of the Fair Labor Standards Act, because:

(a) The transportation by the Government of the munitions and ammunition components owned by it was an administrative act of the Government in its soverign capacity, and not an act of commerce.

(b) The munitions of war involved here were not instrumentalities of commerce nor subjects of commerce, within the meaning of the Fair Labor Standards Act.

V.

Neither petitioners nor respondent was engaged in the production of goods for commerce within the meaning of the Act, because the components, explosives, etc., from which the ammunition was assembled, had come into the actual physical possession of the United States Govern-

ment as the ultimate consumer, and had therefore been withdrawn from commerce, prior to petitioners' having worked on or handled them; hence, such components, explosives, etc., were not "goods" within the meaning of the Fair Labor Standards Act.

ARGUMENT

I.

The Lone Star Ordnance Plant was operated by the Government through the "agency" of respondent, under a Management Service Contract entered into pursuant to the Act of July 2, 1940, amended under First War Powers Act of December 18, 1941, and Executive Order 9001 of December 17, 1941, hence respondent was not an independent contractor, and petitioners were employees of the Government, and excluded under Section 3(d) of the Fair Labor Standards Act.

Under the Act of July 2, 1940, the Secretary of War was given power, with or without advertising, to provide for the manufacture of munitions, military equipment, etc., to purchase or construct munitions plants, as well as to provide Government-owned facilities at privately owned plants. Under Sub-section (b) of the Act, the Secretary of War was authorized with or without advertising, to provide for the operation of any such plants or facilities "either by means of Government personnel or *through the agency* of

[5] P. 598, 54 Stat. 712.
[6] 50 App. U. S. C. A. 611.
[7] 6 F. R. 6787.

selected, qualified commercial manufacturers under contracts entered into with them, and to make such contracts, amendments or supplements to existing contracts as he may deem necessary to carry out such purposes." (Emphasis supplied.)

The Secretary of War chose to operate many munitions plants, including its Lone Star Ordnance facility, through the "agency" of selected, qualified commercial manufacturers, as is evidenced by "statement of labor policy" issued jointly by Under Secretary of War Robert P. Patterson, and Assistant Secretary of the Navy Ralph A. Bard, on July 18, 1942, with the approval of William Green, President of the American Federation of Labor, and Philip Murray, President of Congress of Industrial Organizations. This complete statement of labor policy is attached as Appendix "A" to this brief, but the following excerpts from it are pertinent at this point:

> "Under the terms of the Congressional mandate, the War and Navy Departments had the option of themselves operating the plants or operating them through the agency of selected qualified commercial contractors. In order fully to utilize the labor and management resources of the nation * * * the two departments chose the latter course.
>
> "All are owned outright by the United States * * *. All are engaged solely in war production * * *. All are operated by private contractors under '*management service*' contracts, *any* of which *may at any time* be terminated by the Government * * *. The normal factors which go to make up *commercial profit* are *lacking* * * *. It pays the contractor a fixed fee for its services which fee is unaffected by wages or other costs, production delays or stoppages. The Government

reimburses the contractor for all costs, including wages, and in most instances must approve such costs, including wage scales, in advance. The Army or Navy *officer in charge may direct the discharge of any employee.*" (Emphasis supplied.)

While respondent was designated in the Contract as an Independent Contractor, nevertheless, as has been pointed out under the statement, the Government retained and exercised the right to control respondent in the minutest details in the operation of the Plant. Respondent was economically unaffected by any costs of labor, materials, tools, or equipment, receiving the fixed fee for its management services as designated in the Contract. While the Management Service Contract related only to the manufacture of munitions at the Lone Star Ordnance Plant, yet the Government, by Change Orders, required respondent to perform services, without additional fee or other compensation, at the Navajo Ordnance Depot, Bellemont, Arizona, *as directed by the Contracting Officer.* (Change Order No. 7 dated October 12, 1943, attached to and part of Exhibit "A.") All munitions processed were processed under the direct supervision and control of the Government, which specified the loading processes to be used, the type, quantity and specifications, and rate of production; detailed rules and regulations governing safety and methods of operation were promulgated by the Government, and Government inspectors were present to see that they were complied with. Ordnance personnel audited the time cards and payrolls, and witnessed actual payments to petitioners and all other employees. No ad valorem taxes on real or personal property were paid by respondent to the State or

County, and no license or registration fees were paid on motor vehicles used in connection with the operation of the Plant.

Respondent's discretion with respect to the work to be done, the methods to be pursued in the manufacture of munitions, the nature of, or the disposition of the munitions the Government directed to be produced, was so limited and circumscribed as to amount to no discretion at all. In fact, production schedules from other ordnance plants were transferred to the Lone Star Ordnance facility for completion, and respondent was required to pay from moneys furnished by the Government obligations on all contracts made by such other ordnance plants.

We have pointed out in the general statement many other significant facts clearly showing respondent was not an independent contractor, but was the mechanism through which the Secretary of War provided for the operation of the Plant. Of major significance is the fact that the Management Service Contract effectuating the plan of operation of the munitions facility, contained the provision that the contract could be terminated at any time by the Government merely by giving notice in writing to the Contractor, and that such termination would be "effective in the manner and upon the date specified in said notice." In fact, as pointed out in the statement of the case, all work under the Contract was terminated by notice in writing on October 18, 1945, to be effective midnight October 26, 1945, "for the convenience of the Government."

It is elementary that the right of control is a primary factor distinguishing an agent or servant from an independent contractor. From an analysis of the plan by which the Secretary of War provided for the furnishing of munitions to the Government, it is submitted that respondent was employed for a fixed fee as a service agent of the Government, and was in fact itself a corporate agent or employee of the Government until the time the Government, in the prosecution of the war, no longer needed such munitions, and such an agent which the Government could discharge, as it in fact did, by mere notice in writing, when for the Government's convenience, its services were no longer needed nor desired. It is apparent from the facts that the function of respondent in executing the plan provided by the Secretary of War for the production of munitions, was in every feature controlled by and subject to the right of control by the Contracting Officer representing the Government, with respondent the conduit through which the Government directives of what was to be done, when and how the same should be done, and finally, by whom it should be done, were translated into results.

The facts that (1) petitioners were paid their wages with money furnished by the Government; (2) petitioners' wages and salary rates were controlled by the Government; (3) the hiring and assigning to duties of key employees and their principal assistants, as well as their salaries, had to be first submitted to and approved by the Government; (4) the Government retained the right to dismiss any employee it, through the Contracting Officer, deemed incompetent or not "in the public interest" and, (5) the

Government could dismiss respondent itself by mere notice, considered together with the abundance of facts showing that the Government controlled and directed what work petitioners performed, when and how they performed it, and that all their work was on Government-owned materials, with Government-owned tools and equipment, at the Government-owned plant, shows conclusively that petitioners were employees of the Government, furnishing Government-owned munitions to the Government in the development of the National Defense and the prosecution of the war.

It is submitted that the mere fact respondent was designated as an "Independent Contractor" in the Management Service Contract, is not binding upon the Court.

Rutherford Food Corp. v. McComb, 331 U. S. 722;
N. L. R. B. v. Hearst Publications, 322 U. S. 111;
Bartels v. Birmingham, 322 U. S. 126;
McComb v. McKay (C. C. A. 8th), 164 Fed. (2d) 40.

This Court, in *Rutherford Food Corporation v. McComb, supra*, stated:

> "Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act."

It is also believed by respondent that the decision of this Court in *United States v. United Mine Workers of America, 330 U. S. 258*, is controlling of the question here.

The facts in the case last cited are so well known to this Court we will not refer to them in this brief, other than to point out the significant fact that the regulations

for the operation of the mines by the Coal Mines Administrator provided for the retention of the private managers to assist in the realization of the objects of Government seizure and operation. The Court said, with reference to this fact:

> "* * * The Government, though utilizing the services of the private managers, has nevertheless retained ultimate control."

It was contended in that case also that the regulations which provided that none of the earnings or liabilities resulting from the operation of the mines; while under seizure, were for the account or at the risk or expense of the Government, and that the companies continued to be liable for all Federal, State, and local taxes, and remained subject to suit, constituted the miners employees of the mine owners, rather than the Government; the Court nevertheless held that the employees at the mines were employees of the Government.

See also *Crabb v. Welden Bros.*, *164 Fed. (2d) 797*, involving claims under the Fair Labor Standards Act of employees of cost-plus-fixed-fee contractors in the construction of the Alcan Highway. In that case, the Government furnished the materials and exercised control comparable to that involved here. The Court held that such contractors were not independent contractors, saying, in part, that "The associated contractors, however, were *mere supervisors, employees and representatives* of the Public Roads Administration", and held the Fair Labor Standards Act inapplicable.

The United States Court of Appeals for the Fifth Circuit affirmed the trial court's judgment in the instant case upon this theory, following its decisions in the cases of *Kennedy v. Silas Mason Company, 164 Fed. (2d) 1016* and *Reed v. Murphy, 168 Fed. (2d) 257*, (reversed by this Court because of the inadequacy of the record.)

It is submitted that all of the uncontradicted facts demonstrate that the Secretary of War for the Government, through the agency of respondent, was the employer of petitioners.

II.

The Management Service Contract under which respondent operated the Plant was entered into by the War Department with respondent for "the manufacture of supplies, articles and equipment (munitions of war) in an amount exceeding $10,000.00." The Walsh-Healey Public Contracts Act, rather than, and to the exclusion of the Fair Labor Standards Act, fixed and determined the labor standards, hours of work and overtime compensation of petitioners, even if respondent were considered an independent contractor.

The question here is not so much whether or not petitioners were entitled to be compensated for overtime, but rather which act or acts of Congress providing for the payment of overtime compensation applies.

The Fair Labor Standards Act under which petitioners claim in this case provides for the payment of time and

(49 Stat., 2036, 41 U. S. C. A., Secs. 35-45.)

a half for all hours worked in excess of forty during one administrative work week.

The Walsh-Healey Act presently to be discussed provides that employees engaged in such plants as the Lone Star Ordnance Plant should be paid a minimum of time and a half for all hours in excess of eight in one day, or in excess of forty in one week, and obviously is more advantageous to the employee than the benefits accruing under the Fair Labor Standards Act. For instance, if the employee worked four consecutive days at ten hours each, under the Walsh-Healey Act, he would be paid straight time for thirty-two of the forty hours, and time and a half for the remaining eight hours; whereas under the Fair Labor Standards Act, he would receive only straight time for the forty hours during that administrative work week.

The Walsh-Healey Act was passed by Congress, not in the exercise by it of its right to regulate interstate commerce, but under its inherent right to govern the internal affairs of the Federal Government, and provides the terms and conditions upon which such a manufacturer or contractor may do business with the Government. It was made to apply to all contracts entered into with any agency or instrumentality of the Government for "the manufacture of supplies, articles and equipment in an amount exceeding $10,000.00." That the Contract under which respondent operated the Ordnance Plant is just such a Contract could not be logically questioned; that it was intended to apply and govern the operation of this Plant in the "manufacture of supplies, etc.," is clearly made to appear by the following

provisions of Sec. IV-D of the Management Service Contract: "The following representations and stipulations pursuant to the Walsh-Healey Public Contracts Act shall apply to the operation of the Plant under this Title IV of this Contract." There then follows the representation that the contractor is a manufacturer, etc., and that all persons employed by the contractor shall be paid wages as determined by the Secretary of Labor, etc., prohibiting any person employed by the contractor to work in excess of eight hours in any one day, or in excess of forty hours in any one week, unless paid the applicable overtime rate as set by the Secretary of Labor; a provision prohibiting the employment of minors or convict labor, etc., such representations and provisions under Sec. IV-D being in the identical language of Sections 35 and 36, Title 41, U. S. C. A.

As was said in the case of *Endicott-Johnson Corporation v. Perkins, 317 U. S. 501*, "The purpose of the Walsh-Healey Act was to raise labor standards for the segment of industry *doing business with the Government*", whereas, the Fair Labor Standards Act had its conception in the fertile mind of President Roosevelt when, in submitting this Act to Congress by his message, he said in part: "Competition ought not to cause bad social consequences which * * * react upon the profits of business * * * we must seek to build up * * * minimum wage standards of fairness and reasonableness * * * having due regard to local and geographical diversities and to the effect of unfair labor conditions *upon competition in interstate trade.*" (Emphasis supplied.)

As was pointed out by this Court in *United States v. Darby, 312 U. S. 100,* "The motive and purpose of the present regulations are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of *competition* in the distribution of goods produced under sub-standard labor conditions, which *competition* is injurious to commerce"; and as was pointed out by the Eighth Circuit in the case of *United States Cartridge Company v. Powell, 16 Labor Cases (C. C. H.), Para. 65,085.* "It (F. L. S. A.) was designed and intended to affect private industry engaged in interstate commerce. Its provisions relative to minimum wages and hours of labor for those employed in making goods for the United States were unnecessary, as provision therefor equal or more advantageous to labor had already been made by the Walsh-Healey Act." (Emphasis supplied.)

It is significant also to note that employees of those doing business with the Government, such as the employees of a manufacturer of supplies, munitions, etc., were entitled to be compensated for overtime under the provisions of the Walsh-Healey Act, irrespective of whether or not their activities amounted to, in the strict sense, "commerce", or the "production of goods for commerce." The Walsh-Healey Act became law two years before the Fair Labor Standards Act was passed, and by it, employees of contractors doing business with the Government were protected against exploitation by their employers. There was then left that segment of industry engaged in competition with each other in the production of goods for interstate commerce that had not been regulated, and the obvious fact that

employers in some sections of the country were producing goods for interstate commerce under sub-standard labor conditions, in competition with employers in other sections of the country producing the same type of goods for interstate commerce under standard labor conditions, thereby burdening the channels of interstate commerce with unfair competition, was the economic condition (and not a Government operation) which the Fair Labor Standards Act was designed to correct.

At the time Congress had under consideration the National Defense Act of July 2, 1940, the employees of private industry engaged in interstate commerce, or in the production of goods for interstate commerce, were protected by the Fair Labor Standards Act; the Eight Hour Law, as supplemented, the Bacon-Davis Act,* and the Walsh-Healey Act, protected employees of manufacturers or contractors doing business with the Government, whether in interstate commerce or not, but there remained unprotected those employees working directly for the Government as "Government personnel", except only that they were not required to work in excess of eight hours in one day, without limitation as to the number of hours they could be required to work in one week, and with no provision for the payment to "Government personnel" of any overtime for hours worked in excess of forty in one week.

When Congress had under consideration the Act of July 2, 1940, authorizing munitions and other war plants to be operated "by means of Government Personnel", or

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*(40 U. S. C. A. 276A-276B.)

"through the agency of commercial manufacturers under contracts, etc.," it was appropriate, of course, to provide equal protection to employees of "Government Personnel", and employees of the "agency" or commercial manufacturers, so they extended equal protection to both classes by providing that if such munition plants were operated by means of "Government Personnel", such Government Personnel, working as laborers and mechanics, should be paid time and a half for all hours of work in excess of forty in one administrative work week,[10] and that if such Plants were operated through the "agency" of commercial manufacturers, the provisions of the Walsh-Healey Act, requiring the payment of overtime compensation, should apply. Thus, the Act of July 2, 1940, secured overtime compensation to all persons employed in such munition plants, regardless of which of the two methods the War Department chose to operate them.

It is noted that by supplement 8 to the Management Service Contract (dated March 24, 1944), the Government again unequivocally specified that the Walsh-Healey Act, and the Walsh-Healey Act alone, governed and determined labor standards of employees engaged in the *operation* of Lone Star Ordnance Plant.

The development of labor standards by the various Acts of Congress, beginning with the Eight Hour Law of August 1, 1892, to the end of the war, is interesting, and very persuasive of the contention made under this section of the brief. To avoid unnecessary repetition, this step by step

[10] *Sec. 4(b), Act July 2, 1940, 5 U. S. C. A. 189a.*

development is discussed under the next succeeding Point III, and we invite the Court's consideration of the development there set out in connection with the point now under discussion.

It is therefore submitted that the Walsh-Healey Act, to the exclusion of the Fair Labor Standards Act, applied to this type of operation before the war-time legislation, and that such war-time legislation continued its application, with the exception that it made advertising unnecessary in expediting National Defense and the prosecution of the war.

III.

The application of the Fair Labor Standards Act was excluded and superseded by the Act of June 28, 1940,[11] pertaining to the Naval and Coast Guard services, and the Act of July 2, 1940, relating to the war department. Said Acts provided for a new system for the production of munitions, military equipment and supplies, which innovation was neither private enterprise nor Government operation, but an amalgamation of the two. The First War Powers Act, and Executive Order 9001 promulgated pursuant thereto authorized the Secretary of War, regardless of any previous law, to make contracts for the operation of munitions plants, preserving, however, in their proper fields, the application of the Walsh-Healey Act, the Bacon-Davis Act, the Copeland Act, and the Eight Hour Law, pursuant to which the labor standards of the Walsh-Healey Act were applied to such operations, to the exclusion of all other Federal laws regulating wage payments.

[11] (54 Stat. 676, c. 440, 50 U. S. C. A. App., Sec. 1151, et seq.).

It is respondent's position, as discussed under Point II next above, that the Walsh-Healey Act, by its very terms, applied to the operation of respondent under its Contract with the Government for the furnishing of supplies, material and equipment to the Government; or, as we will presently discuss, under the National Defense Act of July 2, 1940, the First War Powers Act, and the President's Exective Order 9001, the labor standards of the Walsh-Healey Act were applied to such operations to the exclusion of all other Federal laws regulating wage payments.

Over a period of time, beginning with the first Eight Hour Law passed in 1892, to the enactment of the Fair Labor Standards Act in 1938, Congress had been in the process of developing a labor policy toward establishing an eight hour day and a forty hour work week, as an examination of the Chronology set out in Appendix "B" to this brief will reflect.

A brief reference to this development is considered pertinent here.

To begin with, the Eight Hour Law was passed in 1892, applicable only to laborers and mechanics employed by the Government, or a contractor on Government public works, absolutely prohibiting such employees from working in excess of eight hours in one day; it was supplemented in 1912 by requiring every Contract with the Government involving or requiring employment of laborers and mechanics to specifically limit working hours to an eight-hour day; it was again supplemented in 1917 by authorizing the President, in an emergency, to suspend the Eight Hour day on

Government contracts, provided time and a half was paid for hours in excess of eight. The Bacon-Davis Act was then passed in 1931, insuring a living wage scale by requiring public works contracts with the Government to stipulate a wage scale as set by the Secretary of Labor. The Government was authorized to withhold funds to insure compliance. The means of enforcement of Congressional policy, as shown in the Act, were adeptly furnished through the purse strings which the Government held on moneys due on any contract. Legislation of this type gave certain rights to laborers and mechanics under the circumstances enumerated, but Congress thought that enforcement of these rights could more appropriately and effectively be handled by its control of the moneys expended under the contracts. It is apparent that the Government had by then set a labor policy limiting the day's work to eight hours, and made provision to insure to labor that its policy would be enforced in the field of labor standards it had chosen to regulate.

By the passage of the Walsh-Healey Act, Congress expanded its pattern of labor standards or labor policies to a field not theretofore covered, by providing that Government contracts "for the manufacture of supplies, articles and equipment in an amount exceeding $10,000.00" should contain stipulations that minimum wages would be paid as set by the Secretary of Labor, and prohibiting an employee of a Government contractor on such contracts from working in excess of eight hours in one day and forty in one week, except in instances where the Secretary of Labor, in the public interest, made variations and exemptions, and

when such variations and exemptions were made by the Secretary of Labor, the contractor was required to pay a minimum of time and a half for hours worked in excess of eight in one day and forty in one week. Less than three months after the effective date of the Walsh-Healey Act, the Secretary of Labor, by Regulation 504,[12] entered an order permitting employees of contractors with the Government under the Walsh-Healey Act to work in excess of eight hours per day and forty hours per week, provided they were paid time and a half for the hours worked in excess of eight in one day and forty in one week. The Government carried forward its program to insure that the policy established by the Walsh-Healey Act would be enforced, by providing penalties for a violating contractor, and permitting the Government to recover unpaid overtime at its own expense, for the use and benefit of the employees entitled thereto, as well as continued the right to withhold funds due the contractor.

Thus, with the passage of the Walsh-Healey Act, provision had been made by Congress in the field of activity over which it had the unquestioned right to control. As has been pointed out, these rights were exercised, not by virtue of its power to regulate commerce, but by reason of its inherent right to control the affairs of the Government it represented, and to provide the terms and conditions upon which persons may do business with the Government.

If such a cost-plus-fixed-fee contract as is under consideration here had then been authorized and entered into, it

[12] 41 C. F. R. 202.

appears that there could be no question but what the employees of respondent, as the Contractor with the Government, would have been entitled to the wages and overtime provided by the Walsh-Healey Act, and Regulation 504 of the Secretary of Labor.

Thus, the field of Government activity had been covered, insofar as labor standards were concerned, when Congress took up for consideration the necessity of regulating labor standards in private industry not connected or concerned with Government contracts, resulting in the passage of the Fair Labor Standards Act. Obviously, the power of Congress to regulate this field rested exclusively in its power to regulate interstate commerce.

With the threat of war, the National Defense Act of July 2, 1940 (following the Act of June 18, 1940, covering Naval and Coast Guard Services), was passed, authorizing the Secretary of War, with or without advertising, to construct, and, after construction, operate military facilities, and provided that no contract which would otherwise be subject to the Walsh-Healey Act would be exempt from it solely because entered into without advertising, and authorizing such plants to be operated through the agency of commercial contractors, or by means of Government Personnel, and if operated in the latter manner, fixing the hours of laborers and mechanics employed by the Department of War to eight hours a day and forty hours per week, with a minimum of time and a half for hours worked in excess of such limitations.

While the operations authorized by the Act of July 2, 1940, and the previous Act relating to the Naval and Coast Guard Services created an innovation in Government contracting, nevertheless it preserved, in all of its essentials, the Walsh-Healey Act as respects labor standards, even though the contracts were entered into without advertising.

At the time the National Defense Act of July 2, 1940, was passed, the facilities then owned by the Government for the production of instrumentalities of war were wholly inadequate to meet the war emergency. The National Defense Act referred to authorized a virtual mobilization of all the American industries. The key personnel of these industries possessed invaluable experience and knowledge in mass production and industrial technique, with little or no experience, however, in the production of ammunition; on the other hand, the Ordnance Department possessed the technical knowledge essential to the development and production of high explosives, ammunition, and other implements of war. A combination of the knowledge and skill of Ordnance Personnel, and the experience of the key personnel of private industry, and a coördination of the two into a joint activity, was desirable—indeed, essential—to carry out the vast plans for National Defense, and a merger of the two by the National Defense Acts was made possible.

That the operations under these two Acts were unique, is best evidenced by the statement of labor policy reproduced in full in Appendix "A" to this brief, in part as follows:

> "These plants embody a new and unique tripartite relationship among Government, labor and manage-

ment. They are sufficiently different from traditional Government establishments so that *existing* Government policies *regulating labor relations* are not entirely suitable." (Emphasis supplied.)

After giving the Secretary of War the powers indicated next above, the Act of July 2, 1940, contained the further general provision (see Sec. 1) authorizing him to make such contracts or amendments or supplements to existing contracts "as he may deem necessary to carry out the purposes specified in this section." These were extra-ordinary and plenary powers granted only during the emergency of war.

Following this Act, the First War Powers Act[13] was passed, which provided inter alia: "The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President, for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress and other payments thereon, *without regard to the provisions of law* relating to the making, *performance*, amendment, or modification of *contracts* whenever he deems such action would facilitate the prosecution of the war." (Emphasis supplied.)

Thus, the President was empowered to authorize any department or agency of the Government to make contracts pursuant to the First War Powers Act, without regard to the provisions of any existing law, with reference to advertising, labor standards, or otherwise, and he exercised such

[13] *50 App. U. S. C. A. 611.*

authority when he promulgated Executive Order 9001, authorizing the Secretary of War to enter into contracts, etc., without regard to the provisions of law relating to the making, performance, etc., of such contracts, with the limitation that no contract or modification or amendment should be exempt from the provisions of the Walsh-Healey Act, because of being entered into without advertising and competitive bidding, also providing that the Walsh-Healey Act, the Bacon-Davis Act, the Copeland Act,[14] and the Eight Hour Law, "if otherwise applicable" should apply to contracts made and performed pursuant to the order.

It is respondent's contention that the Walsh-Healey Act governed and controlled the performance of the Management Service Contract under consideration here by the very terms of the Walsh-Healey Act itself, and the nature and purpose of the operation for which the Contract was entered into with the Government. Whether the Walsh-Healey Act applied for these reasons, or, as has been suggested, was selected as the labor standards governing the production of munitions for the Government under plenary powers given the Secretary of War by the Act of July 2, 1940, it is unquestioned that the Walsh-Healey Act was the standard adopted in the Management Service Contract executed on July 23, 1941. It is plain by the provisions of the First War Powers Act, that the President was given such plenary power to disregard any prior existing law, whether related to labor, advertising, or otherwise, and in his proclamation authorizing the Secretary of War to

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[14] *38 App. U. S. C. A. 611.*

[15] *48 Stat. 948, Title 40 U. S. C. A. 276 (b) and (c).*

carry out the purposes of the First War Powers Act, the Walsh-Healey Act was expressly retained as the labor standards governing existing contracts and amendments, or modifications thereof. The Management Service Contract under consideration here was amended by Supplement No. 1 September 16, 1942, and by Supplement No. 8 March 24, 1944, under the authority of the First War Powers Act, and the Presidential Proclamation 9001, in both instances expressly reaffirming and reincorporating into said Contract the labor standard of the Walsh-Healey Act.

That the utilization of the combination of Government, industry, and labor under the National Defense Acts and the First War Powers Act was unique is recognized by the statement of labor policy previously referred to, and for all parties concerned in this tripartite arrangement, the standard of labor set by the Walsh-Healey Act was the most desirable and the procedures of the Walsh-Healey Act the most logical to be applied; this because for labor it provided a greater income for the same number of hours, and for the Government, it held the purse strings and had the means of enforcement. Moreover, by adopting the Walsh-Healey Act as the labor standards, there was secured to all employees on contracts authorized, whether in interstate or intrastate commerce, the same labor standards.

There was no danger of spreading substandard labor conditions in this "unique" industry, so long as the Government paid the bill, first because there was no element

of competition in the manufacture of ammunition, and secondly because there was a declared policy of Congress that all persons employed in these plants should receive such additional compensation for overtime. With the shields of protection emanating from the war time legislation and the executive orders promulgated pursuant to it, and the strict supervision of labor in them, there was no chance of an unscrupulous employer, acting as a Government agency, exploiting labor. For example, Executive Order 9240[9] required payment of double time to an employee working on the seventh consecutive day.

The Walsh-Healey Act contains a special and complete labor policy of its own, which was expressly designed to cover the class of employees performing labor under this type Contract. Whatever rationale may be employed, the conclusion is inevitably reached that the wage-hour standards of the Walsh-Healey Act were applied to respondents' operation to the exclusion of the Fair Labor Standards Act.

IV.

Neither petitioners nor respondent was engaged in interstate commerce nor in the production of goods for commerce within the meaning of the Fair Labor Standards Act, because:

(a) The transportation by the Government of the munitions and ammunition components owned by it was an administrative act of the Government in its sovereign capacity, and not an act of commerce.

[9] 7 F. R. 7759.

(b) The munitions of war involved here were not instrumentalities of commerce nor subjects of commerce, within the meaning of the Fair Labor Standards Act.

From petitioners' pleadings, it is apparent they make no real contention that they or respondent were engaged in commerce. This is because the movement of all component parts of the ammunition was caused to be made by the Government after it had already acquired title and possession thereof; the same is true as to the finished product. The common carriers moving these component parts from the point of origin to the plant site, and after processing to its military facilities, could not be regarded as the agent of any one other than the Government.

The Government, it is submitted, in the exercise of rights and prerogatives delegated to it as a Federal Union, knows no state lines, and any movement by it of its own property across state lines is not commerce nor a commercial transaction, but instead is an administrative act of the Government exercised by it in its sovereign capacity.

The term "commerce", as used in the Fair Labor Standards Act,[1] is considerably more restricted than the term as applied in the National Labor Relations Act, and we regard the decision of the Ninth Circuit Court of Appeals in *N. L. R. B. v. Idaho-Maryland Mines Corporation, 98 Fed. (2d) 129*, as authority for the proposition that the transportation of these munitions was an administra-

[1] 29 U.S.C.A., Sec. 151, et seq.

tive act of the Government, and not "commerce" within the meaning of the Act under consideration. See

Holland v. Haile Gold Mines, 44 Fed. Supp. 641;

Walling v. Haile Gold Mines, Inc., 136 Fed. (2d) 102 (4th Cir.);

Fox v. Summit-King Mines, 143 Fed. (2d) 926 (9th Cir.).

The decision of *Bell v. Porter, 159 Fed. (2d) 117*, cited by petitioners, is not authority for the position they maintain because respondent conceded in the trial court that the complaining employees were covered by the Act. See *Bell v. Porter (N. D.), 66 Fed. Supp. 49.*

That the activities of petitioners were neither "commerce" nor "production of goods for commerce" is held in the cases of *Kennedy v. Silas-Mason Company, 164 Fed. (2d) 1016; St. Johns River Ship Building Company v. Adams, 164 Fed. (2d) 1012* (both by the 5th Cir.); *Divins v. Hazeltine Electronics Corporation, 163 Fed. (2d) 100 (2nd Cir.); Barksdale v. Ford, Bacon & Davis (W. D. Ark.), 70 Fed. Supp. 690*, and *Lynch v. Embry-Riddle Company (D. C. Fla.), 63 Fed. Supp. 992.*

The statement on page 11 of the petition for certiorari, that petitioners were engaged "in the continuous exportation of the finished products outside of the State of Texas" is not only not supported by the record, but is contrary to it. (See Para. 5, Supplemental Affidavit, Motion for Summary Judgment, R. 80-81.)

The statement on page 12 of the petition that respondent was engaged in the manufacture or production of "fertilizer" at the Plant, is not supported by the record. There are no pleadings to that effect, and this statement does not appear in the record in any place, except in the so-called "response" to respondent's Motion for Summary Judgment, which the United States Court of Appeals in this case held was not entitled to consideration.

V.

Neither petitioners nor respondent was engaged in the production of goods for commerce within the meaning of the Act, because the components, explosives, etc., from which the ammunition was assembled, had come into the actual physical possession of the United States Government as the ultimate consumer, and had therefore been withdrawn from commerce prior to petitioners' having worked on or handled them; hence, such components, explosives, etc., were not "goods" within the meaning of the Fair Labor Standards Act.

The term "goods", as used in the Fair Labor Standards Act, is defined in Section 111 to be:

> "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof,

other than a producer, manufacturer, or processor thereof."

We reassert that the Government owned the reservation, the munitions plant, and furnished the component parts from which the munitions were assembled, taking title thereto at the point of origin, shipping them to the Plant site under Government bill-of-lading, had the munitions inspected by the Government's employees at the Plant site, and its Army Officers shipped the finished ammunition from the Plant site under Government bill-of-lading, marked "Government Property for Military Use."

That petitioners' activities were exempt under Section III has been many times held.[18] Petitioners seem to have ignored the obvious fact that when goods come into the hands of the ultimate consumer, they are withdrawn from commerce, and what the consumer does with such goods, or where he thereafter carries them, is of no consequence. This section does not exclude the "ultimate consumer" as such, but excludes the persons employed by him who work on "goods" after their delivery into his actual physical possession. See illustrations given in *Divins v. Hazeltine Electronics Corporation, supra.*

Petitioners' contention that the exclusionary clause was intended solely to protect the purchasing consumer from

[18] *Crabb v. Webber Bros.*, 164 Fed. (2d) 797; *Divins v. Hazeltine Electronics Corporation*, 163 Fed. (2d) 100; *Barksdale v. Ford, Bacon & Davis*, 70 Fed. Supp. 649; *Kennedy v. Silas-Mason Company*, 164 Fed. (2d) 401.

being subjected to the penalties imposed by Section 15A(1) has been rejected. *Divins v. Hazeltine Electronics Corporation, supra; Kennedy v. Silas-Mason Company, supra.* It will be noted that the penalties under Section 15 can be imposed only when there has been a *willful* violation.

The ultimate consumer exclusionary clause is inapplicable only when the ultimate consumer is a producer, manufacturer, or processor of such goods; hence, one of two things is certain: If the Government *was not* a producer, manufacturer or processor of such goods, petitioners' work upon them was excluded by Section 3; or, if the Government *was* a producer, manufacturer, or processor, so as to make Section 3 inapplicable, then it is because the Government was such producer, manufacturer or processor through the "*agency*" of the respondent contractor, in which event the Walsh-Healey Act (discussed under Points II and III of the Argument), to the exclusion of the Fair Labor Standards Act, fixed the labor standards, hours of work, and overtime compensation for petitioner-type employees.

CONCLUSION

The United States Court of Appeals affirmed the trial court's judgment upon the principle announced under Point I. Respondent presents that it could have upheld the lower court's judgment upon any one or more, or a combination of the points set forth in the Summary of Argument.

It is respectfully submitted that the record supports the judgment entered in the Courts below, and that the petition should be denied.

Respectfully submitted,

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APPENDIX A

Congress has charged the War and Navy Departments with the responsibility for the operation of nearly 100 giant Government-owned munitions plants, the backbone of the Nation's armament program. Under the terms of the Congressional Mandate, the War and Navy Departments had the option of themselves operating the plants or operating them through the agency of selected qualified commercial contractors. In order fully to utilize the labor and management resources of the Nation and to minimize encroachment upon the country's industrial structure, the two Departments chose the latter course. The industrial units thus created are unique.

All are owned outright by the United States, but all but a very few are located upon military reservations. All are engaged solely in war production—the manufacture and loading of explosives and ammunition, the assembly of bombers and the fabrication of guns and other munitions. In all of the plants the work performed is of a secret or confidential nature, and in many of them it is highly hazardous. All are operated by private contractors under "Management Service" contracts, any of which may at any time be terminated by the Government if it should decide either to operate the plant itself or to entrust its operation to another contractor. The normal factors which go to make up commercial profit are lacking. The Government had title to the products at all times. It pays the contractor a fixed fee for its services which fee is unaffected by wages or other costs, production delays or stoppages. The Govern-

ment reimburses the contractor for all costs, including wages, and in most instances must approve such costs, including wage scales, in advance. The Army or Navy officer in charge may direct the discharge of any employee if he deems it to be in the public interest. These plants embody a new and unique tripartite relationship among Government, labor and management: They are sufficiently different from traditional Government establishments so that existing Government policies regulating labor relations are not entirely suitable.

Recognizing these facts, and desiring to preserve the greatest freedom of organization and collective bargaining by the employees which is compatible with the necessary discharge by the War and Navy Departments of their responsibility for maximum production and the safe and efficient operation of these plants, the War Department and the Navy Department have established the following labor policies to which the American Federation of Labor and the Congress of Industrial Organizations have agreed after assisting in their preparation. It is recognized that these policies do not cover all aspects of labor relations in these plants, and experience may indicate the desirability of modifying, adding to, or otherwise amending this statement of policy.

1. No employee or person seeking employment shall be discriminated against by reason of race, color, creed, or sex.

2. The recognition of an exclusive bargaining agent for the employees in any appropriate bargaining unit within

any plant will be deferred until a majority of the estimated total of that unit has been hired, unless special circumstances shall justify an earlier designation of such exclusive bargaining agent. The War and Navy Departments will undertake to estimate with reasonable promptness the total employee complement of the appropriate unit.

3. While no recognition shall be accorded any organization as the exclusive representative of any group of employees until the proper collective bargaining agency shall have been determined under the conditions described above, provision will be made for the handling of grievances and other disputes, and the elimination of friction between employees and management during the period pending such determination. These procedures should be approved by the representative of the Army or Navy in charge of operations at the plant.

4. Seniority shall be a determining factor in matters affecting layoff and reemployment, transfers, demotions and promotions only if other factors of ability and aptitude are equal.

5. (a) Discharges directed by the War or the Navy Departments for suspicion of subversive activities will be handled in accordance with the provisions of the "Joint Memorandum on Removal of Subversives from National Defense Projects of Importance to Army or Navy Procurement," dated January 10, 1942.

(b) Discharges directed by the Army or Navy Officer in charge in the interest of plant security will be handled in the following manner: (1) The Officer, or his represen-

tative will direct the contractor to suspend the employee in question immediately; (2) the employee will be advised in detail of the specific reasons for his suspension and of his right to a hearing; (3) if requested, a hearing will be held by the Officer, or his representative, within a reasonable period and at such hearing the suspended employee will have an opportunity to produce witnesses and present evidence and to be assisted by counsel; (4) based on such hearing, the Officer, or his representative, will direct the reinstatement (with authority to grant back pay) or the discharge of such employee; (5) an employee so discharged will have the right, upon request, to have his case reviewed by the War or Navy Department.

6. No agreement between the management and its employees, or their representatives, except those which affect the safety and health of employees, may be entered into, or action taken, which, in the opinion of either the Secretary of War or the Secretary of the Navy, will have the effect of restricting or hampering maximum output.

7. (a) Anti-sabotage, anti-espionage and plant protective measures, including access into the plant, approved or prescribed by the War and Navy Departments, or their representatives, shall be binding upon management, employees, and their representatives.

(b) Measures designed to guard against sabotage, espionage, subversive activities and other plant protective measures which are ordered or approved by the Army or Navy representatives shall insofar as practicable be prominently posted throughout the plant and otherwise made

available to employees. Violations of any of these rules or regulations shall be grounds for disciplinary action, including immediate dismissal.

8. (a) The War and Navy Departments in most instances, have contractual responsibility for the approval of all costs including payroll costs. These Departments therefore will from time to time jointly agree upon the policies to govern the exercise of these contractual responsibilities to approve or disapprove proposed wage scales at these plants.

(b) Before operations commence at any plant, the contractor will prepare a wage scale to apply upon the commencement of operations and submit the same for approval to the War or Navy Department through the local Army or Navy representatives at the plant, who will forward these with their own comments regarding the appropriateness of the proposed scale. Any subsequent adjustments in the initial wage scale at any plant shall be worked out by the contractor and the employees through established procedures, provided only that the approval of the War or Navy Department must be obtained before such adjustments may become effective.

9. This statement of policy shall be applicable to all such plants except that where any provision of the statement conflicts with a provision in an existing contract, such contract will not be altered except by mutual consent.

APPENDIX B

CHRONOLOGY OF ACTS OF CONGRESS
(Fixing Wage-Hour Standards)

August 1, 1892 Eight Hour Law (40 U. S. C. A. 321, 322)—Unlawful to require or permit employees of Government or contractor on public works to work in excess of eight-hour day.

June 19, 1912 Eight Hour Law Supplemented (40 U. S. C. A. 324, 325)—Every Government contract involving or requiring employment shall specifically limit working hours to eight-hour day.

March 4, 1917 Eight Hour Law Supplemented (40 U. S. C. A. 326)—President authorized in emergency to suspend eight-hour day under Government contracts provided time and one-half paid for overtime.

March 3, 1931 Bacon-Davis Act (40 U. S. C. A. 276 a, 276 a-b)—Public works contract to stipulate wage scale set by Secretary of Labor and permit Government to withhold funds to insure compliance.

June 13, 1934 Copeland Act (40 U. S. C. A. 276 b, c)—Kickbacks prohibited as condition of employment where Government contract or money is involved.

June 30, 1936 Walsh-Healey Act (41 U. S. C. A. 35-45)—Government contracts for supplies and equipment are to expressly limit labor in excess of eight-hour day and forty-hour week. Minimum wages to be set by Secretary of Labor, who in the public interest is authorized to make

variations and exemptions in wage scales and maximum hours, provided that time and one-half shall be paid for the overtime permitted at the discretion of the Secretary of Labor. Government may withhold payment or sue contractor for failure to comply.

September 14, 1936 Regulation 504 of Secretary of Labor (41 C. F. R. 201)—Section 201.103 permits employees manufacturing supplies and equipment for Government to work in excess of eight hours per day and forty hours per week if paid time and one-half for overtime.

June 25, 1938 Fair Labor Standards Act (29 U. S. C. A. 201-219)—Provides for minimum wages and maximum hours (unless overtime is paid) for employees engaged in interstate commerce or in the production of goods for commerce. Civil suit for double amount of underpayment plus attorneys' fees may be brought by employees. Overtime computed solely on basis of excess over forty hours in one work week.

June 28, 1940 Eight Hour Law Partially Supplemented [50 U. S. C. A. App. 1155 (b)]—During national emergency declared by President on September 8, 1939, provisions of law prohibiting more than eight-hour work day by persons engaged in work on Army, Navy and Coast Guards contracts suspended.

July 2, 1940 National Defense Contract Act (Public Law 703, 76th Congress) (Title 50 App., U. S. C. A. 1171, 1172)—Secretary of War authorized, with or without advertising, to enter into and to amend contracts (including cost-plus-fixed-fee contracts) for the construction of military

facilities and the manufacture of military equipment, munitions, etc.; provided that no contract which would otherwise be subject to the Walsh-Healey Act would be exempted from the Walsh-Healey Act solely because entered into without advertising.

The Act also provided (5 U. S. C. A. 189-a) that the hours of laborers and mechanics employed by the Department of War in the production of munitions and other military equipment should be eight hours a day and forty hour per week during national emergency, provided, however, the Secretary of War was authorized to allow such hours to be exceeded, in which event, time and one-half should be paid for all hours over forty.

September 9, 1940 Eight Hour Law Amended (40 U. S. C. A. 325-A)—Wages of laborers covered by Act of June 19, 1912 (40 U. S. C. A. 324, 325) to be computed on eight-hour day but overtime permitted where time and one-half paid for more than eight hours worked in any given day.

December 18, 1941 First War Powers Act (50 App. U. S. C. A. 611)—President may authorize war effort Government contracts, amendments or modifications without regard to previous laws and regulations governing same.

December 27, 1941 Executive Order 9001 Pursuant to War Powers Act (58 App. U. S. C. A. 611)—Title I. Secretary of War authorized to enter into and amend war effort contracts.

Title II, Sec. 8 provides:

"No contract or modification or amendment thereof shall be exempt from the provisions of the Walsh-Healey Act because of being entered into without advertising or competitive bidding, and the provisions of such act, the Bacon-Davis Act, as amended, the Copeland Act, as amended, and the eight-hour law, as amended September 9, 1940, if otherwise applicable shall apply to contracts made and performed under the authority of this order."

May 13, 1942 Amendment to Walsh-Healey Act (41 U. S. C. A. 35)—Walsh-Healey Act amended to exempt application of eight-hour day and forty-hour week under certain conditions where collective bargaining contracts were on an annual or semi-annual basis.

June 12, 1942 Regulation 504 by Secretary of Labor Amended (Title 41, Part 201, C. F. R.)—Amended pursuant to Act of May 13, 1942. The regulation as to public contracts supplemented to conform to amendment of Walsh-Healey Act of May 13, 1942.